



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL APPEAL NO. 69 OF 2018**

**MARK OTIENO NYAKITI.....1ST APPELLANT**

**WILFRED WAMBIRE INONDA.....2ND APPELLANTS**

**VERSUS**

**HAROLD MBITHI MATITHU.....RESPONDENT**

**JUDGEMENT**

**Facts and historical background**

1. The suit before the trial court was founded on the tort of negligence and sought the recovery of damages for personal injuries allegedly suffered by the respondent when he was hit and injured by the motor cycle owned and controlled by the appellants. The record of appeal indicates that the respondent instituted **Mombasa Chief Magistrates Court Civil Suit No. 1421 of 2015** against the appellants on allege a road traffic accident pleaded to have occurred along Nyerere Avenue in Mombasa on 28th April 2014.
2. According to the plaint, the respondent was lawfully walking at/near/towards the ferry roundabout when the 2nd appellant (being the authorised driver/rider of motor cycle registration number KTWA 145B owned by the 1st Appellant) negligently drove the same causing it to veer off the road and hit/ knock down the respondent.
3. The respondents pleaded that he did suffer severe bodily injuries and was rushed to Coast General Hospital where he was admitted for treatment from the date of the accident until 14th May 2015. The 2nd appellant on the other hand was arrested and charged with the offence of permitting an unauthorised person to drive the said motor cycle. The record shows he was convicted and fined Kshs. 10,000 for the offence.
4. For the appellants, a defence was file in which it was pleaded that neither of the was the beneficial owner nor driver of the tuk-tuk on the material date and time. The occurrence of the accident and causation thereof were all denied, it being pleaded 9n the alternative that if any accident ever occurred as alleged then the same was caused or substantially contributed to by the respondent.
5. The matter was heard and judgement delivered on 23rd March 2018 by Hon. F. Kyambia SPM. In his reserved determination the trial magistrate found the appellants wholly liable for the accident and entered judgement in the sum of Kshs. 1,502,500/= against them jointly and severally. It is that decision which aggrieved the appellants who then filed the instant appeal by which the appellants only challenge the assessment of damages. That may not be explicit from the memorandum of appeal but the submissions filed and address by the counsel confirmed that only assessment of damages are in issues in this appeal

**Issues for Determination**

6. I have perused the pleadings filed herein with specific regard to the memorandum of appeal and the submissions filed by both parties. The crux of the appellants' case is that the quantum of damages awarded by the trial court is excessive. In the circumstances, I frame the issues for determination as follows:

- i. whether the trial court applied the right principles in determining the damages to be awarded; and
- ii. whether the damages awarded are excessive?

**Determination**

7. As a first appellate Court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions while bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand as they gave evidence.

8. The duty of the court in a first appeal such as this one was stated in **Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** as follows:

**This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that: -**

**“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”**

9. While that remains the general and established mandate of this court on a first appeal, and while this appeal is limited to the assessment of damages, the liberty by the court to interfere with an award made pursuant to judicial discretion is very limited. The court cannot interfere with an award merely because it would have awarded a different sum<sup>1</sup>. high as to amount to undeniable erroneous estimates. The court

<sup>1</sup> Akbar Mohamed Haji Ali v Jackton Ouma Okello [2018] eKLR

<sup>2</sup> Gicheru V Morton and Another (2005) 2 KLR 333

is not at liberty to substitute its discretion for that of the trial court<sup>3</sup>. The only time an interference is allowed is when it is demonstrated that the award made was out of consideration of an irrelevant fact or failure to consider a relevant matter<sup>4</sup>, failure to apply the applicable principles and short of that, the court must be satisfied that the award is inordinately so low and small or outrightly exorbitant and demonstrates a wholly erroneous estimate of the damages<sup>5</sup>

10. According to the appellants, the general damages for pain, suffering and loss of amenities of Kshs. 1,500,000/= awarded by the trial court is excessive and ought to be reviewed downwards. The respondent on the other hand is satisfied with the amount awarded and supports the judgment in full.

11. The basis and reasons given by the trial court in arriving at the award were captured in the following words

**“I have considered the aforesaid submissions by both counsels. The decision cited by counsel for the plaintiff involved injuries of a more severe nature than the instant case. On the other hand the decisions cited by the defendants’ counsel are comparable injuries save that they were decided over a decade ago. Taking into consideration the passage of time since the said awards**

<sup>3</sup> George Gikubu Mbuthia v Consolidated Bank of Kenya Ltd & another [2016] eKLR

<sup>4</sup> Kemfro Africa Limited t/a Meru Express Service Gathogo Kanini v. A.m. Lubia and Olive Lubia (1982 –88) 1 KAR 727 at p. 730

<sup>5</sup> Butt v. Khan [1981] KLR 349

**were made and taking into consideration inflation factors, an award of Kshs. 1, 500,000/= shall be reasonable compensation to the plaintiff. The plaintiff pleaded special damages of Kshs. 2,500/=. The same was strictly proved and I do award the sum of Kshs. 2,500/=”.**

12. Did the trial magistrate apply the right principles? Is an award of Kshs. 1,500,000 excessive in the circumstances? From the judgement, it is evident that the trial magistrate proceeded on the right principles of assessment of quantum. The trial magistrate acknowledged that; damages are strictly meant to compensate a party for loss suffered and as such should be commensurate to the injuries suffered; damages should not be inordinately too high or too low; where past decisions are taken into consideration, they should be taken as mere guides and each case depends on its own facts and where past awards are taken into consideration as guides an element of inflation should be taken into account as well as the purchasing power of the Kenyan shillings, then at the time of the judgment.

13. The above listed principles of assessment are now settled in Kenya and I need not belabour them. I will now determine whether the award of Kshs. 1,500,000/= is justifiable given the circumstances of the case. I note that at trial, the respondent prayed for an award of Kshs. 2,000,000.00 while the appellants proposed an award of between Kshs. 500,000.00 and Kshs. 600,000.00. I have considered the arguments and authorities adduced by both parties in support of their respective positions.

14. The respondent cited **JAMES KATUA PETER v SIMON MUTUA MUASYA [2008] eKLR** in support of his claim for damages. In that case, the claimant suffered a multitude of injuries including posterior fracture and dislocation of the left hip, fracture of the acetabulum roof etc. Noteworthy is that the plaintiff’s doctor recommended total hip replacement at a cost of Kshs. 500,000 and assessed total disability at 70%. In the instant case, the respondent’s disability was assessed at 8% due to among others, comminuted fractures of the right tibia and right fibula leg bones and fracture of the pelvis pubic bone. All factors considered, I agree with the trial court’s finding that the authority relied on by the respondent involves injuries of a more severe nature than the instant case. The same authority cannot therefore be applied to guide the assessment of damages.

15. On their part, the appellants cited **SIMON MUTISYA KAVII v SIMON KIGUTU MWANGI [2013] eKLR** and **MICHAEL OUMA NYAOKE v CIRES NYANCHAMA NYASOKO [2010] eKLR** in support of their case. In the former case, the claimant suffered comminuted fracture of left tibia, fibula with severe friction burn and was awarded Kshs. 200,000 while in the latter case, the claimant suffered injuries to the pelvic area and was awarded Kshs. 300,000. The cases were decided in 2013 and 2010 respectively. I agree with the trial court's finding that these cases cited by the appellant entailed comparable injuries.

16. That disparity in the awards cited by either side appears to be the basis the appellants contend that the award made is too high. It would appear that counsel were content with the decisions they had cited at trial save that the appellant cited to court the decision in **Tayab vs Kinanu (1983) eKLR** where the court of appeal quoted with approval the decision of the House of Lords in **West (H) & Sons Ltd vs Shepherd (1964) AC 326** asking for uniformity in awards to create certainty and to keep the awards within range incapable of hurting the economy.

17. This Court's powers to disturb an award of damages may be invoked where the amount awarded is so inordinately high as to represent an entirely erroneous estimate. In my view, the figures proposed by the appellants were in tandem with past decisions even though it gave little regard to inflationary factors and passage of time more accurately.

18. Considering the law in decided cases, which must remain just guidelines, and while I do wholly appreciate the task of assessment of damages to be a difficult task and invite judicial discretion, I do find that the sum awarded is on the high side and does not conform to the requirement that comparable injuries should attract comparable awards. On that finding, I do set aside the award of Kshs 1,500,000 and in its place I substitute an award of Kshs 1,000,000 for general damages. The special damages of Kshs. 2,500 stand since they are unchallenged. I therefore enter judgement for the respondent against the appellants jointly and severally in the sum of **Kshs. 1,002,500** with interests from the date of the judgement of the trial court till payment in full. The appellants will have the costs of this appeal.

**Dated and Signed at Mombasa this 16th day of April 2020.**

**P.J.O. OTIENO**

**Judge**

**Delivered and signed at Mombasa court this 23rd day of April 2020**

**E. Ogola**

**Judge**